Austal USA, L.L.C. *and* Sheet Metal Workers International Association Union, Local 441. Cases 15–CA–16552, 15–CA–16578, 15–CA–16596, 15–CA–16642, 15–CA–16677, 15–CA–16721, and 15–RC–8394

March 21, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 7, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief. The Charging Party/Petitioner filed an answering brief, a cross-exception, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended order as modified.

More specifically, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by: coercively questioning employees about their union sentiments; threatening plant closure, job loss, stricter discipline, and other unspecified reprisals if the employees voted for the Union;[3] promising or impliedly promising benefits if the employees rejected the Union;[4] giving informal evaluations to three employees because of their union activity; and instructing employees not to read or discuss union material during working time.[5] We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by: terminating team leader Charles Gates because he would not support the Respondent's position on unionization;[6] refusing to allow Gates to return to the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall order a new election. First, we agree with the judge that the Union's objections that were coextensive with meritorious complaint allegations should be sustained and warrant a new election. Second, in regard to the Union's additional objections, we agree that the Respondent's conduct of placing security guards at the gate of the plant on the morning of the election was objectionable. Accordingly, we find it unnecessary to pass on the issue of whether the Respondent engaged in objectionable conduct by providing employees with an on-premises barbeque, free concert tickets, and an off-premises party prior to the election.

[3] In finding a violation in the conversation between Supervisor Calhoun and employee Jenkins, Chairman Battista relies solely on Calhoun's statement that if the Union did not get in, the Respondent would get rid of card signers.

[4] Chairman Battista adopts the judge's finding that the Respondent violated Section 8(a)(1) by promising or impliedly promising benefits if the employees rejected the union. In doing so, he relies only on CEO Alan Lerchbacker's statements that: "the Company was going to help the employees;" he "would make a change," and that within 6 months "there will be a difference;" his references to improving insurance and raises, and paving the driveway; and his assuring employees that he would "put a stop to" whatever caused employees to have to go between their supervisor and their supervisor's supervisor about raises.

[5] We find it unnecessary to pass on the judge's analysis and conclusion that the Respondent violated Sec. 8(a)(1) by temporarily prohibiting employees from displaying union insignia on their hardhats. In our view, this alleged violation would be cumulative of other violations found, and thus would not materially affect the Board's Order. See *Strand Theatre of Shreveport Corp*.,346 NLRB No. 51, slip op. at 1 fn. 2 (2006); *Ivy Steel & Wire, Inc*., 346 NLRB No. 41, slip op at 2 fn. 8 (2006). Specifically, the Order prohibits the Respondent from discriminating against those who support the Union, and accordingly will preclude the Respondent from discriminatorily barring employees from wearing union insignia on their hardhats.

[6] We agree with the judge that Gates is not a "supervisor" as defined in Sec. 2(11) of the Act. As the party asserting supervisory status, the Respondent's burden is to establish that status by a preponderance of the evidence. *Dean & Deluca of New York, Inc.*, 338 NLRB 1046, 1047 (2003). The Respondent asserts only that Gates had the authority to "assign" and "responsibly direct" the employees on his crew. Without deciding whether Gates's job functions meet the definition of either "assign" or "responsibly direct," we agree with the judge's conclusion that Gates's duties "do not demonstrate the exercise of independent judgment."

"[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, 348 NLRB No. 37, slip op. at 8 (2006). "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Ibid. Purely conclusory evidence is not sufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006).

Most of the Respondent's evidence is comprised of conclusory statements in Gates's affidavit, like "I make the work assignments to the crew" and "I . . . check on the crew to make sure they were completing the work assignments given to them." What little specific evidence put forward by the Respondent with respect to the discretion exercised by Gates in performing these duties actually undermines its position. Gates testified that his supervisor, Mickey Slade, "would give [him] an overview of what needed to be done, or if he had certain people he wanted to work on . . . certain jobs[; a]nd then [Slade] would be off doing paperwork, and it would sort of be up to [Gates] to get these people where [Slade] wanted them." This appears to demonstrate that Gates's judgment in performing these duties was "dictated or controlled" by "the verbal instructions of a higher authority." Further, the Respondent adduced no evidence regarding the factors weighed or

Respondent's premises as an employee of a contractor the day after he was terminated; terminating eight employees on May 9, 2002;[7] suspending employee Tony Causey and terminating him; giving employee Darrell Spencer a 3-day suspension;[8] and, giving employee Hank Williams a verbal warning.[9]

balanced by Gates in either assigning or directing employees. Thus, we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical. See *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. at 6 (2006).

[7] We disagree with our dissenting colleague's conclusion that, in finding this violation, the judge relied on a theory neither alleged in the complaint nor litigated at the hearing. The complaint alleges that the Respondent terminated the employees, thereby discriminating against them and discouraging membership in a labor organization in violation of Sec. 8(a)(3) and (1). Our colleague acknowledges the General Counsel's further explanation, in his opening statement at the beginning of the hearing, that "[t]he employees were told that they were being laid off, but they would not have any recall rights. So, our position is that they were effectively terminated." Thus, both the complaint and the General Counsel's litigation theory were the same, that the employees were terminated. That additional facts and circumstances surrounding the terminations were established through evidence adduced at the hearing is hardly surprising: it is the General Counsel's burden to establish sufficient facts to support finding the alleged violation. This process of developing the underlying facts of a case does not alter the basic nature or theory of the complaint.

[8] Our dissenting colleague contends that the Respondent rebutted the General Counsel's evidentiary showing, arguing that the Respondent lawfully suspended employee Darrell Spencer for performing poor welding work. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We disagree. The dissent's view does not fully account for the undisputed facts and the judge's credibility findings.

There is no question that the General Counsel made a showing sufficient to establish that Spencer was suspended at least in part because of his union activity. There is also no question that he was a competent welder. He expressed his concern that the welding job at issue could not be successfully performed using the specified wire, and he asked Supervisor Calhoun if he could use smaller wire. It is undisputed that in the past Spencer had been permitted to use whatever size wire he thought was appropriate. This time, however, Calhoun denied Spencer's request, referring to "specifications." Spencer followed instructions, and the weld failed two times. He was then suspended.

The judge did not credit Calhoun, who testified that Spencer was disciplined for intentionally making a bad weld. He did credit Spencer, who testified that he did not deliberately make a faulty weld but, following the instructions of his supervisor, did the best he could using the wire he was instructed to use.

The record establishes that if the Respondent had treated this situation routinely, it would have permitted Spencer to use the wire of his choice. The Respondent did not do that; instead, as the judge found, it "put Spencer in a situation where he could not properly perform the weld," and then disciplined him, asserting that Spencer intentionally made a bad weld. There is no credible evidence justifying Calhoun's conduct or supporting the Respondent's purported reason for the suspension. Accordingly, the Respondent did not prove that it would have acted the same way in the absence of Spencer's protected union activity.

[9] In the absence of exceptions, we adopt the judge's findings that: (a) the Respondent did not violate Sec. 8(a)(1) by creating an impression of surveillance, soliciting its employees to rescind their union authorization cards, threatening employees with termination or coercively interrogating them by inquiring who had thrown away company fliers, asking its employees for their opinion regarding why they wanted the Union, urging all employees to vote for the Company, and impliedly threatening plant closure; (b) the Respondent did not violate Sec. 8(a)(3) by giving informal evaluations to three employees; (c) the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by terminating employee Joe Wooten; and, (d) the Respondent did not engage in objectionable conduct by making overtime mandatory.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Austal USA, L.L.C., Mobile, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(d) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 21, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part

I agree with my colleagues in all respects except the following

1. Contrary to my colleagues, I do not find that the Respondent violated Section 8(a)(3) by suspending employee Darrell Spencer. I conclude that the Respondent suspended Spencer for making an improper weld.

Before making the weld, Spencer told Welding Supervisor John Calhoun that he wanted to use a smaller wire than called for by the customer's job specification. Calhoun denied the request, citing the specification. Following Calhoun's instruction, Spencer made the weld. He acknowledged that the weld was defective. The suspension notice issued to Spencer cited "lack of quality work."

The judge found that the discipline was unlawful. I do not agree. I find that the Respondent has effectively rebutted the General Counsel's prima facie case of a violation. It is uncontested that the customer specification called for wire of a specific width. There is no probative evidence that the specification was faulty or was otherwise generally incapable of being performed satisfacto-

rily. It is clear that the Respondent believed that the weld could be done under these specifications. It is also clear that Spencer held a contrary belief. Obviously it is not necessary for the Board to resolve this technical issue regarding welds. Suffice it to say that the Respondent discharged Spencer because, in its view, the defective weld was Spencer's fault.

Contrary to the contention of my colleagues, there is no record evidence that Supervisor Calhoun had ever authorized Spencer to ignore a customer's specifications. Nor is there an allegation that Calhoun's instruction here (i.e., to follow the customer's specifications) was discriminatorily motivated. Finally, there is no record evidence to support the notion that the work could not possibly be done under the customer's specifications. Indeed, it would strain credulity to believe that Calhoun would direct an action which was bound to result in failure. In short, Spencer's work was defective, and he was disciplined for that action. I find, therefore, that the Respondent has rebutted the General Counsel's prima facie case. Accordingly, I find that the Respondent's discipline of Spencer was lawful.

2. I do not adopt the judge's finding that the Respondent unlawfully terminated eight employees.[1] I reach this conclusion solely because the judge's finding was based on a theory that was neither alleged in the complaint nor litigated at the hearing.

The complaint alleges that the Respondent terminated the employees on May 9, 2002, thereby "discriminating in regard to the hire or tenure or terms and conditions of employment of its employees" and "discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act." The General Counsel's theory of the case, as alleged in the complaint and explained in his opening statement, is that "[t]he employees were told that they were being laid off, but they would not have any recall rights. So, our position is that they were effectively terminated." The judge found the violation based on a different theory, i.e., that the Respondent temporarily laid off the employees but later, realizing that temporarily laid-off employees would be eligible to vote in a Board election, changed the layoff to a discharge. In sum the complaint alleged a discharge based on union activity. The violation found by the judge and my colleagues is deficient in two respects. It is that a layoff was converted to a discharge in order to render employees ineligible to vote. Because this theory was not alleged in the complaint nor litigated at the hearing, the Respondent was not on notice of the need to litigate such an allegation.[2] Therefore, I would reverse the judge's unfair labor practice finding.

Dated, Washington, D.C. March 21, 2007

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you regarding your union sympathies and activities.

WE WILL NOT threaten you with unspecified reprisals because of your union support.

WE WILL NOT threaten you with termination because you support the Union.

WE WILL NOT discriminatorily restrict you from discussing unions.

WE WILL NOT threaten you with plant closure if you select a union as your collective bargaining representative.

WE WILL NOT harass you because of your support of the Union.

WE WILL NOT solicit your grievances and promise to remedy them in an effort to dissuade you from supporting the Union.

[1] The eight terminated employees are Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer.

[2] *Desert Aggregates*, 340 NLRB 289, 292–293 (2003) (The Board may find violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, but only if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated; however, whether a matter has been fully and fairly litigated rests in part on whether the absence of a specific complaint allegation precluded a respondent from presenting exculpatory evidence or altering its conduct of a case to address the allegation); *Champion International Corp.*, 339 NLRB 672 (2003).

WE WILL NOT threaten you with discipline pursuant to more stringent enforcement of our rules because of your union activity.

WE WILL NOT interfere with other employment opportunities of former employees because of their union sympathies.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association Union, Local 441 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, rescind the warning issued to Hank Williams and the suspensions issued to Tony Causey and Darrell Spencer.

WE WILL within 14 days of the Board's Order, offer Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, Dirk Spencer, and Darrell Spencer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning, suspension, and discharges, and within 3 days thereafter notify the affected employees in writing that this has been done and that those actions will not be used against them in any way.

AUSTAL USA, L.L.C.

Charles R. Rogers, Esq., for the General Counsel.
William C. Tidwell III, and *Amy Lassiter St. Pe, Esqs.* for the Respondent.
Kimberly C. Walker and *Cecil Gardner, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Mobile, Alabama, on January 27, 28, 29, and 30, 2003.[1]The consolidated complaint issued on October 22.[2] The complaint, as amended at the hearing, alleges several violations of Section 8(a)(1) of the National Labor Relations Act and one warning, two suspensions, and the discharge of 11 employees in violation of Section 8(a)(3) of the Act.[3] On November 1, the Regional Director issued an order that directed a hearing on objections in Case 15–RC–8394 and consolidated that case for hearing with the unfair labor practice cases. The Respondent's answer denies any violation of the Act. I find that the Respondent violated Section 8(a)(1) of the Act substantially as alleged in the complaint and also, with the exception of the discharge of one employee, violated Section 8(a)(3) substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Austal USA, L.L.C., the Company, is a limited liability partnership engaged in the construction of high speed aluminum boats at its facilities in Mobile, Alabama, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Alabama. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Sheet Metal Workers International Association Union, Local 441, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company, a subsidiary of Austal Limited, an Australian corporation, began operations at its Mobile, Alabama, facility late in the year 2000. Until April 2002, vice president of Operations Simon Thornton was the senior management official. On April 12 or 13, Alan Lerchbacker was hired as chief executive officer. Bender Shipbuilding owns 30 percent of the Company. Various Bender executives have provided logistical support to the company.

In April, the Union began an organizational campaign at Austal's facility. On April 3, business manager Tommy Fisher and other union representatives handbilled at the Company, presenting employees with union authorization cards and a leaflet. On April 10, the Union handbilled again, announcing a meeting on April 11. On April 12, the Union filed the representation petition in Case 15–RC–8394. The parties entered into a

[1] All dates are in 2002 unless otherwise indicated.

[2] The charge in Case 15–CA–16552 was filed on April 17 and amended on September 30; the charge in Case 15–CA–16578 was filed on May 2; the charge in Case 15–CA–16596 was filed on May 9 and was amended on May 15; the charge in Case 15–CA–16642 was filed on June 18; the charge in Case 15–CA–16677 was filed on July 15 and was amended on August 26 and September 30; and the charge in Case 15–CA–16721 was filed on August 26 and amended on September 25.

[3] The amendment consisted of five additional Section 8(a)(1) allegations, subparagraphs 9(i) through 9(m), that were tendered on a typewritten document to all parties. A copy of that document is hereby added to the formal papers as General Counsel's Exhibit 1(mm).

Stipulated Election Agreement. The election was held on May 24.

The Company responded to the Union's campaign. Supervisors began meeting, both individually and in small groups, with employees. Bender's vice president of Support Services Danny Sellers, who had never before provided any services to Austal, spoke at small group meetings of six to eight employees with Austal's Production Coordinator David Growden and vice president Thornton. CEO Lerchbacker was present at some of these meetings. Sellers also "talked to everybody in the shipyard" individually.

The vast majority of the alleged violations herein occurred during the critical period between April 12 and May 24.

B. The 8(a)(1) Allegations

1. Welding Supervisor John Calhoun

During the following week following the handbilling of April 3, prior to when some employees began wearing union t-shirts and displaying union stickers, Welding Supervisor John Calhoun spoke with employee Wayne Jenkins in the tool room. Calhoun called Jenkins aside, told him that he wanted to talk to him, "friend to friend," and asked if Jenkins had signed "any papers to be in the Union." Jenkins, replying to the word "papers," replied that he had not, although he had signed an authorization card. Calhoun responded, "Well good," but then referred to union authorization cards rather than "papers," stating that, if Jenkins had signed a card he could write and get it back, that "the cards will have to go across Simon Thornton's desk . . . [and] if the Union didn't come in that there would be hell to pay for everybody, . . . that they will eventually start getting rid of the people that signed the union cards."

Jenkins recalled that Calhoun also said, if the employees selected the Union as their collective bargaining representative, "the Union would call a strike . . . [and] that he [presumably referring to Thornton] would hire scabs here to take our place, and that . . . we would not be hired back in." Jenkins attributes a similar statement to Calhoun in a later conversation.

Calhoun denied having any conversation with Jenkins in the toolroom and specifically denied questioning him regarding signing anything or threatening that there would be "hell to pay." I do not credit that denial. The conversation with Jenkins occurred at the inception of the Union's organizational effort, prior to employees wearing union paraphernalia. Calhoun testified to having been instructed regarding what he could or could not say in the campaign, but did not place a date upon when he received those instructions and could not recall what he was told, although he states he knew at the time. Jenkins' straightforward testimony was fully credible. Calhoun's bias was apparent and his demeanor was less than impressive. I credit Jenkins.

The foregoing evidence establishes that Calhoun's initial conversation with Jenkins occurred prior to employees wearing union paraphernalia, thus it occurred prior to the initial union meeting on April 11 rather than on April 19 as alleged in the complaint, which would have placed the conversation within the critical period. I find that Calhoun's' questioning Jenkins regarding whether he had signed any "papers," coupled with the statement that employees could get their union authorization cards back, followed by the reference to Thornton seeing the cards, that there would be "hell to pay" and that the Respondent would get rid of card signers if the Union did not succeed in becoming the employees' collective bargaining representative constituted a coercive interrogation. I find, as alleged in subparagraphs 7(c), (f), and (g) of the complaint, that the Respondent coercively interrogated an employee, threatened unspecified reprisals, and threatened job loss in violation of Section 8(a)(1) of the Act.

There is no evidence of surveillance. Since Jenkins denied having signed any papers, the factual statement that employees could get cards back did not constitute a solicitation to revoke anything. I shall therefore recommend that subparagraphs 7(d) and (e) be dismissed.

After April 11, employees who supported the Union began wearing insignia reflecting their sentiments, including t-shirts and stickers that they placed on their hardhats. Calhoun, "seeing as how the hard hats belong[ed] to Austal USA," questioned Production Coordinator David Growden as to whether employees should be allowed to put stickers other than Austal stickers on their hardhats. Growden agreed that they should not, and Calhoun acknowledges that, thereafter, he asked "any employee" that he saw to remove from the hardhat "any sticker that Austal did not give to you." This direction to remove the stickers was also communicated to some employees, including Robert Skelton, by Team Leader Joe Reed.

It appears that most employees were requested to remove the stickers on the morning of a workday in the week following the union meeting on April 11, but the date is not established. In most cases, the request was rescinded about a half hour to an hour after it was made. Growden explained that, after he agreed with Calhoun that employees should not be permitted to place stickers on Austal property, he "double-checked with my boss Simon [Thornton]." Thornton said that he would check with the lawyer. Shortly thereafter, Thornton told Growden that employees could wear the stickers and Growden told Calhoun that "we have made a mistake," to inform the employees that they could wear the union stickers. Calhoun did so, telling employees that they could "feel free" to put their stickers back on their hardhats.

In some cases, the request was not rescinded for a full day. Employee Nathaniel Haywood was in a group of employees receiving welding training from Calhoun at a class conducted in the training trailer. Calhoun asked everyone in the class to remove any stickers that were not issued by Austal. Haywood, who had a union sticker on his hardhat, removed it. It was not until the following day, when Haywood reported to the class in the training trailer, that Calhoun told him that employees could wear the stickers.

The Respondent argues that the prompt recession of this instruction obviates any violation. I disagree. Unlike *Atlantic Forest Products*, 282 NLRB 855 (1987), in which the unlawful direction was given to only two employees, the direction in this case was made throughout the facility by Reed and Calhoun, who admits speaking to every employee he observed wearing union stickers. In the case of Haywood, it was not rescinded until he reported for his training class, a day after he received the initial instruction. See *Mr. Z's Food Mart*, 325 NLRB 871,

891 (1998). The rescission did not occur in a context free from other unlawful conduct. Although the Respondent, in its brief, characterizes the action as a "fleeting incident," the unlawful instruction was not isolated. The rescission was communicated as an absence of objection by management. Employees were told, in Calhoun's words, that they could "feel free," if they wished, to wear the stickers. The rescission, stated as a management decision, did not acknowledge that employees had a Section 7 right to wear the stickers or that the Respondent had infringed upon that right. Furthermore, it did not unambiguously and specifically repudiate that infringement, and it did not assure employees against future interference by the Employer in the exercise of their Section 7 rights. *Community Action Commission*, 338 NLRB 664, slip op. at 667–668 (2002). The Respondent, by directing employees to remove union stickers, violated Section 8(a)(1) as alleged in subparagraphs 7(b) and 9(j) of the complaint.

Subparagraph 7(a) of the complaint alleges that Calhoun threatened unspecified reprisals. The evidence relating to this allegation is employee Robert Skelton's testimony. Skelton began wearing a union t-shirt after the union meeting on April 11. A few days after this, he encountered Supervisor Calhoun and employee Glen French outside the break room. Skelton recalls that, when Calhoun observed him, he asked where he got the t-shirt and how much he had paid for it. Skelton responded that the Union gave it to him and he did not have to pay for it. Calhoun responded that it would "cost me more than what I realized." Calhoun acknowledged an encounter similar to that described by Skelton, but testified that he was talking with employee James Pike and that employee Wayne Jenkins, rather than Skelton, was the other person involved in the conversation. According to Calhoun, Pike asked how much Jenkins had paid for the shirt and he, Calhoun, stated, "[P]robably more than you know."

The Respondent, in its brief, argues that Calhoun's admitted comment, that the shirt cost "probably more than you know," was a legitimate comment that referred to "fees, dues, fines, and assessments." That argument might have merit if Calhoun had referred to dues or fees, but he did not. I credit Skelton. I find that Calhoun's reference to the unspecified "costs" that Skelton did not realize, like the reference to "hell to pay" that Calhoun stated when interrogating Jenkins, threatened unspecified reprisals in violation of Section 8(a)(1) of the Act.

Among the employees requested to remove stickers was Jenkins. When the request was rescinded, Jenkins did not have a standard sticker to replace the one that he had removed and, therefore, he placed a small bumper sticker on his hardhat. Thereafter, outside the pontoon boat at which Jenkins was working, Calhoun approached Jenkins and asked why he wanted the Union. Jenkins told him "better benefits, the pay scale, because they paid everybody different . . . [, and that] nobody had the same classification." After discussing the classification of a particular employee, the conversation continued and Calhoun noted that, if a strike occurred, the Company "would hire scabs" and "would not hire us back." Calhoun admitted that he was familiar with the word "scabs," but denied using it, and that, in response to a question by Jenkins, he informed him that the Company had the right to replace strikers.

In early April, the Company began responding to the Union's organizational efforts with fliers that it produced. One morning, as employee Zolia Powell entered the break room and was putting down her lunch before going to work, Supervisor Calhoun and Fitter Supervisor Dennis Sigur entered the break room, went straight to a garbage can, and looked into it. Calhoun asked if any of the employees present knew who had thrown away the Company fliers. After Calhoun and Sigur left, Powell looked and saw that a stack of those fliers had been thrown into the break room garbage can. Thereafter, Calhoun approached Powell and asked her individually whether she knew who had thrown away the fliers. She responded that she did not. Calhoun stated that if he found out who had done so, they would be terminated.

The General Counsel and the Charging Party argue that Calhoun's asking Jenkins at the pontoon boat why he supported the Union is encompassed by subparagraph 7(i) of the complaint alleging unlawful interrogation. At that time, Jenkins had openly shown his support for the Union. The inquiry was not coercive. The Charging Party argues that Calhoun also threatened discharge, as alleged in subparagraph 7(h) of the complaint, when, in this same conversation, he referred to hiring scabs if there were a strike and that the Company "would not hire us back." The General Counsel does not argue that the foregoing statement is encompassed in subparagraph 7(h). See *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

Counsel for the General Counsel argues that Calhoun's asking Powell whether she knew who had thrown away the company fliers coupled with a threat to terminate the individual responsible constituted interrogation and a threat of discharge and violated the Act as alleged in subparagraphs 7(h) and (i) of the complaint. The destruction of Company property, even if it is in the form of antiunion propaganda, is not protected activity. Calhoun's inquiry was not coercive and the threat of termination for destroying company property did not violate the Act. I shall recommend that subparagraphs 7(h) and (i) of the complaint be dismissed.

Following the discovery of the fliers in the garbage can, the Company printed another set of fliers. At a safety meeting, Powell recalls that Calhoun referred to the fliers, urging employees to "get the facts." Contemporaneously with his urging employees to "get the facts," he threatened that employees would be terminated if they were "caught discussing the fliers that the Union had passed out." Employee Dirk Spencer corroborates this testimony. Although less specific than Powell, he recalled Calhoun "basically saying that you cannot say anything during working hours about the Union." Employee Andre Love confirms that Calhoun informed employees that "talking about the Union while you are supposed to be working is proper grounds for termination." On cross-examination, Powell repeated that Calhoun made it clear that "it was okay if you wanted to discuss the company flyers on company time, . . . [b]ut you couldn't discuss the union flyers on the company time. That was the difference."

Calhoun did not deny urging employees to "get the facts" from the Company fliers while at the same time prohibiting any discussion of the union fliers during working time. There is no evidence of any prohibition against all talking, such as talking

while working or waiting for a supervisor to come solve a problem. Calhoun acknowledged that talking is not an issue unless the nonwork conversation takes away from production, that is, when they are "standing chit-chatting" about something other than the job. Prior to the union organizational effort, notes from safety meetings reflect that Calhoun admonished employees for "too much talking."

The complaint, in subparagraph 7(j), alleges that the Respondent, through Calhoun, promulgated a discriminatory no talking rule. The record establishes that, prior to the effort of the Union to organize the employees, the only prohibition was upon talking that interfered with production. The credible testimony of Powell establishes that, after the Union began its organizational effort, Calhoun prohibited all discussion of union fliers on Company time. The foregoing selective restriction, targeted specifically to union related conversations, violated Section 8(a(1) of the Act.

2. Welding Team Leader Joe Reed

Although hourly paid, welding Team Leader Joe Reed issued discipline. He was a supervisor, and the Respondent so admits. Reed attended the first union meeting on April 11. The complaint, in subparagraph 9(m), alleges that Reed engaged in surveillance by attending that meeting. On April 11, the unit had not been defined. The Union's petition sought a unit of all hourly production and maintenance employees, "*including leadmen*." [Emphasis added.] Reed was an hourly paid leadman. On April 12, the parties entered into a Stipulated Election Agreement pursuant to which team leaders were excluded from the unit. Reed attended no further union meetings. There is no evidence that Reed attended the meeting on April 11 at the behest of the Respondent. I shall recommend that this allegation be dismissed.

In mid-April, employee Darrell Spencer, a welder, engaged in discussions with Reed regarding the Union. In one of these conversations, Reed informed Spencer that "the Company wasn't going to pay us any more money, and that they would shut down, and . . . leave here before they would adapt to having a union." Reed, although initially denying that he "ever talk[ed]" with Spencer about the union, and specifically denying the comments to which Spencer testified, later acknowledged that Spencer had come to him with some questions and "I told him that I was not allowed to talk about union issues during company time." Despite this purported restriction upon Reed, he admitted that, in conversation with another employee, he had informed the employee that his signing a card did not obligate him to pay union dues. I credit Spencer. By threatening plant closure, the Respondent violated Section 8(a)(1) of the Act as alleged in subparagraph 9(k).

In mid-April, the Respondent, for the first time, filled out assessment sheets relating to welders. Wayne Jenkins recalls that Team Leader Reed evaluated him, stating that he was performing a job assessment and then placing letter grades on a sheet. Employee Hank Williams, who like Jenkins wore a union sticker and t-shirt, testified that Reed also came to where he was working, told him to stop, and, in his presence, filled out an assessment sheet writing down grades, "like A, B, or C." Williams had been working at the Company since August 2001, and this was the first time that he had received such an evaluation. Employee Donnell Hill was hired in March. He too wore union paraphernalia. Shortly after Calhoun rescinded his direction that employees remove their union stickers, Reed came to where Hill was working and said that there was a "new policy that we are going to start evaluating each and every employee." He then filled out a sheet, grading Hill with letter grades.

Counsel for the Respondent, in his opening statement, indicated that the assessments were for supervisors and were performed by Calhoun. Counsel corrected the identification of the supervisor performing the assessments to Team Leader Reed in the Respondent's brief. In his opening statement, Counsel represented that, when it was learned that two employees had been assessed, "we made him stop." Notwithstanding that representation, Team Leader Reed did not acknowledge that the evaluation of the employees was performed in error or that he was made to stop. Reed testified that, when Hill questioned what the form was for, he told him that "the assessment form was to improve him in areas to prepare him for evaluation." There was no testimony relating to how the assessment related to improvement. Reed did not put the forms in the employees' files and believed that he threw them away.

The Respondent's unprecedented assessments, giving letter grades to Jenkins, Williams, and Hill, three open union advocates, suggests an implicit threat to their employment and constituted harassment. There is no evidence that any employee who did not support the Union was similarly assessed. Reed's assertion that the documents were to prepare the employees for evaluation is belied by the absence of evidence of any action taken with regard to such preparation and the failure of the Respondent to maintain the documents. The foregoing compels the conclusion that the Respondent had no job related purpose regarding these assessments; thus I shall recommend that the allegation that the assessment violated Section 8(a)(3) of the Act be dismissed. The absence of any job related purpose in these assessments confirms that the Respondent had no purpose other than harassing these three employees because of their support for the Union. In so doing the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 11 of the complaint.

3. Production Coordinator David Growden

In mid-April, employee Tony Causey complained to Growden about a warning he had received from Calhoun. Calhoun was not Causey's supervisor. That warning is not alleged as a violation. In their discussion, Growden asked why the employees needed a union. Causey, focusing on the warning, responded that "nothing was being done" when they came to him with a problem, such as the manner in which Calhoun supervised, noting that the employees were "getting threatened every time they go to a safety meeting." Growden took out a yellow tablet and Causey continued, noting various problems. Growden, although not specifically addressing the matters that Causey raised, stated that the employees "were not going to have a union, that he was "going to do whatever it takes to keep the Union from that Company." Growden acknowledged speaking with Causey and testified that he told him the Company was going to do everything "legally possible" to keep the Union out.

According to employee Hank Williams, in April or early May prior to the layoffs that occurred on May 9, he was approached by Production Coordinator Growden who asked him to come to his office. Only Growden and Williams were present. Growden asked Williams how he thought the Union would help "on the floor." Williams responded that the employees needed better benefits. Growden denied initiating any conversation with Williams or questioning him and testified that Williams told him why he thought the Union was needed. Growden did not deny that the conversation occurred in his office, and he admitted that he informed Williams that "we didn't want a union." Growden acknowledged that he could not "recall exactly our conversation." He admitted that he wanted to know "what problems the employees had" and "why some of the employees supported the union," stating, "It's part of my job to find all information about the employees' conditions out there." I credit Williams.

In early May, employee Zolia Powell, having heard that management "wanted to talk" with employees about their problems, sought to meet with Growden with another employee. Growden dismissed that employee from the meeting and then asked Powell what problems she was having. Powell spoke about the manner in which Calhoun supervised employees, "always threatening," as well as various other complaints. In the course of the conversation, Growden asked Powell for her opinion regarding "why the employees wanted the Union at Austal." As Powell was leaving Growden stated that he appreciated her speaking with him, that he wanted to find out what the employees' complaints were "and see if he could do something."

The complaint, in subparagraphs 8(a) and (b), alleges that Production Coordinator Growden interrogated employees and solicited their grievances with an implied promise to remedy them. Growden, in asking Causey, Williams, and Powell for their opinion regarding why the employees wanted the Union, did not seek to have them divulge their activities. Their union sympathies were known. Growden's question was not interrogation but solicitation of their grievances. I shall, therefore recommend that subparagraph 8(b) be dismissed.

The Board addressed conduct similar to that in which Growden engaged in *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), stating:

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary. [Footnote omitted.]

The foregoing three one-on-one meetings with Growden must be viewed in perspective. Following the institution of the union organizational campaign, the Respondent began meeting in small groups with employees. Bender's vice president of Support Services Danny Sellers, who had never before provided any services to Austal, spoke at these meetings and began talking "to everybody in the shipyard" individually. There is no evidence that similar meetings had ever been held. The Respondent's managers and Sellers sought to determine "why the employees wanted the Union at Austal." In order to answer that question, management officials began listening to and questioning employees.

When employees Causey and Powell approached Growden, he took the opportunity to seek their opinion regarding the impetus for the union campaign. Although Williams had not sought to speak to Growden, Growden sought to speak to him. The Respondent argues that no violation should be found as a result of these discussions because Growden "never promised anything." Growden admitted stating to Causey that the Company was going to do everything "legally possible" to keep the Union out. Unless he intended the foregoing as a veiled threat of retaliatory action, it could have no meaning other than as an expression of commitment to be responsive to the concerns that Causey raised. When speaking with Powell, Growden told her that he wanted to find out what the employees' complaints were "and see if he could do something." In these circumstances, as in *Mast Advertising*, 286 NLRB 955, 961 (1987), "cautious language, or even a refusal to commit the employer to specific corrective action, did not cancel the employees' anticipation of improved conditions if the employees opposed the union." I find, as alleged in subparagraph 8(a), that the Respondent solicited employee grievances and implied that they would be remedied.

4. CEO Alan Lerchbacker

Employee Darrell Spencer, like all employees, attended a small group meeting in the trailer in which Production Coordinator Growden's office is located. CEO Lerchbacker was present at the meeting Spencer attended. He recalled that Lerchbacker stated that he "needed some feedback, "he wanted to know "what was the Company's problems with the employees." Lerchbacker stated that "he wanted to make it known that . . . the Company was going to help the employees," and he specifically mentioned improved insurance and raises.

Employee Andre Love also attended a meeting at which CEO Lerchbacker, Sellers, and Growden were present. I do not credit his assertion that Lerchbacker affirmatively stated that he was a "union buster," although that may well be the impression that Love formed. Love recalled that Lerchbacker stated that he "would make a change," that within 6 months "there will be a difference." Lerchbacker mentioned working with supervisors and paving the driveway. Love recalls that, as soon as Lerchbacker mentioned those specifics, Sellers interrupted him and told Lerchbacker that he "can't promise us that," that he could not make promises "to get us to go against the Union." Later in the meeting, employee Clifford Rayford began speaking against the Union, referring to his previous employment at a different company where his pay was cut and suggesting that Austal needed to "kick them [prounion employees] out the gate." Love recalled that Lerchbacker endorsed the statement, saying, "that sounds like a good idea." Near the end of the meeting, Love noted that he had been promised, but had not received, a pay raise and that he had been "going back and forth between Dave Growden, who was sitting in there, and . . . Calhoun." Ler-

chbacker stated that "no employee should have to go between his supervisor and his supervisor's supervisor about raises and . . . he would put a stop to that."

CEO Lerchbacker denied making any promises or adopting any statement relating to sending employees out the gate. Lerchbacker was, by agreement of the parties, presented before the General Counsel and the Charging Party rested their cases because he was going out of town. I shall not speculate whether his mind was preoccupied. Suffice it to say that his shifting recollections give me no confidence in his testimony. Referring to his work history, Lerchbacker initially testified that he had worked in both union and nonunion situations, and that "it didn't matter to me." He then amended this testimony stating that "it did matter." When asked, regarding employee Clifford Rayford, "Do you remember him or know him," Lerchbacker answered "No." He thereafter attributed the comments regarding an employee's experiences with a union at a pervious employer to an employee he identified as Shelton and denied that Shelton had said anything about sending employees out the gate. When asked again about Rayford, Lerchbacker contradicted his prior answer, testifying that he did know Rayford, but did not recall him being at a meeting. Although Sellers denied that any management official made any promises in his presence, he did not specifically deny interrupting Lerchbacker and telling him not to make promises. Sellers did not address Lerchbacker's attribution of comments to Shelton rather than Rayford, nor did he deny that Lerchbacker adopted a statement relating to sending or kicking employees out the gate. Neither Growden nor Sellers contradicted Love's testimony regarding "going back and forth" between Growden and Calhoun and that Lerchbacker stated he would "put a stop to that." I credit Spencer and Love.

Lerchbacker's request for feedback constituted solicitation. His generalized assertion that "there will be a difference" within 6 months constituted a promise of benefits, as did his references to improving insurance, paving the driveway, and assuring that he would "put a stop" to whatever caused employees to have to go between their supervisor and their supervisor's supervisor. The foregoing solicitation of grievances and promises to remedy them violated Section 8(a)(1) of the Act as alleged in subparagraph 9(l) of the complaint. The endorsement of Rayford's suggestion that prounion employees be kicked out the gate threatened termination as alleged in paragraph 10 of the complaint and violated Section 8(a)(1) of the Act.

5. Bender's Vice President Danny Sellers

Employee Hank Williams recalled that, shortly before the election, Sellers approached him and "wanted to know if I was going to vote right." Williams was an outspoken prounion employee and acknowledged that it was obvious how he felt. He did not specifically recall the exact words used by Sellers who credibly denied asking any employee how he was going to vote but urged all employees to vote for the Company. I shall recommend that subparagraph 9(a) of the complaint be dismissed.

At a small group meeting that included employees Causey, Jenkins, Powell, and Warren Gatwood, Causey recalls that Bender's vice president Sellers, who spoke at all of these meetings, referred to Lerchbacker, stating that he was the new CEO, that he had spoken with him, and that "we ought to give Alan [Lerchbacker] a chance," that if the employees gave him a chance, they would "see better things happen at the Company." I have found that Lerchbacker himself assured employees that he would be responsive to their complaints. Although Sellers denied making any promises, he did not specifically deny the foregoing comment. I credit Causey. Sellers' assurance that if they gave Lerchbacker a chance they would "see better things happen at the Company" constituted a promise of benefit if the employees rejected the Union and, as alleged in subparagraph 9(i) of the complaint, violated Section 8(a)(1) of the Act.

In the course of the meeting, Sellers mentioned discipline. Jenkins recalls that Sellers stated that he was "looking at everybody's time cards" and if employees had excessive absences or tardies, "they would be disciplined." Gatwood recalls Sellers stating that the Company was going to have to start going by the disciplinary guidelines in the handbook. Causey recalls that Sellers specifically addressed him, stating that he had "looked at everyone's attendance," that "he was the one at fault for getting me wrote up." Sellers admitted reviewing the attendance of all employees "prior to them taking disciplinary action." His undenied acknowledgement to Causey that he was responsible for him being disciplined together with his undenied comment that employees with excessive absences "would be disciplined," confirm Gatwood's undenied testimony that the Respondent was going to start going by the handbook. Sellers' presence at the facility was in response to the organizational campaign. The Respondent threatened discipline pursuant to more stringent enforcement of its rules as alleged in subparagraphs 9(b) and (c) of the complaint in violation of Section 8(a(1) of the Act.

The complaint, in subparagraph 9(d), alleges that Sellers "impliedly threatened" plant closure. Sellers acknowledged discussing a situation at an International Paper Company plant in a small group meeting with employee Ronnie Murphy. Both were familiar with the situation. Murphy did not testify. Employee Andre Love, who was in the meeting, recalls Sellers making a statement about the union at that plant being "too greedy," but did not place that statement in context, stating that "it was just so much going back and forth." The evidence does not establish an implied threat of closure. I shall recommend that this allegation be dismissed.

C. The Discharge of Charles Gates

Charles Gates, an experienced welder, began his employment in engineering at the Company on January 8, 2001. In October 2001, he was promoted to team leader under Supervisor Mickey Slade and received a $1-an-hour raise in pay. Engineering employees perform welding and pipefitting.

It is undisputed that Gates was terminated because he refused to support the Company's position of opposition to the Union. During the last week of April, Sellers spoke with Gates. Sellers asked Gates "why the Union" was at the Company. Gates responded that employees were upset with a lack of standardization in pay rates and the manner in which they were treated. Sellers informed Gates that, "as a member of management, . . . [he] had to promote a non-union view." Gates responded that he wanted "to be left neutral." Sellers informed him that he

could not be neutral; he "had to promote non-union." Gates noted that his family was "third generation" in the Union. Sellers advised Gates that he could not remain neutral and that he would have to make "a critical career decision." Gates left the meeting. He was terminated for failure to uphold Company policy on May 1.

Although the Union initially sought to include leadmen, the unit to which the parties stipulated specifically excludes team leaders. Team Leader Joe Reed is alleged as, and admitted to be, a supervisor. The Company argues that all team leaders are supervisors. The General Counsel and Charging Party argue that, notwithstanding the shared title of team leader, the determination of whether Gates was a supervisor is dependent upon the authority he exercised. Board precedent confirms that this argument is correct.

It is undisputed that Reed issued discipline. Gates did not, although he did serve as a witness when Supervisor Slade issued discipline. Gates did not have authority to authorize overtime, but he would ask for volunteers for overtime after Slade approved it. There is no evidence that Gates either had authority to grant, or ever granted, time off. Supervisor Slade handled all matters relating to time. The only documents signed by Gates were requisitions for material from the tool room. Although the Company argues that two documents signed by Gates titled, Purchase Requisition, constituted orders from outside vendors, no vendor is shown on either document. Gates explained that these simply reflected a change in the internal form used by the Company. Gates' testimony in this regard is uncontradicted, and the small amount of material involved, one 2-inch fitting and one 2-inch coupler and 8 1-inch fittings and two 1-inch couplers, is consistent with his testimony that these were too room requisititons, not orders from outside vendors. There is no evidence that Gates' approval of these requests for materials from the tool room was other than routine.

On a typical workday, employees in engineering would gather. "Mickey [Slade] would come out . . . and basically [conduct] a roll call . . . ." Slade would have a sheet that would have "pressing items or pressing systems that we needed to pay certain attention to, . . . highlighted, or he would request certain people to be put on." Gates would then make the work assignments and assure that the work was kept flowing. As employees finished one task, it was up to Gates to get them "headed in the direction of a secondary job for the day," subject always to Slade's oversight; "Mickey [Slade] let me know what, if we had other things [that] . . . he wanted done."

As team leader, Gate answered employees' questions to the best of his ability. If he could not answer a question, he "would go find him [Supervisor Slade] to get a question answered, or have him [Slade] come look at it."

Gates' testimony that he spent 90 percent of his workday working with his tools is uncontradicted.

In *SDI Operating Partners, L.P.*, 321 NLRB 111 (1996), the Board determined that a leadman who "gave the other glaziers their assignments, distributing the work based in part on his past observations concerning the employees' qualifications . . . [and] instructed other employees as needed in accomplishing the work, relying on his own experience and expertise, as well as the instruction manuals provided by the suppliers of the products being installed" was not a supervisor. The Board noted that the leadman did not have the authority to grant overtime or require employees to work overtime, or "generally to grant time off," but that he had permitted an employee to leave once in an emergency situation. In the instant case, Gates had no authority relating to time. I find that Gates' duties "with respect to the assignment and direction of employees do not demonstrate the exercise of independent judgment, but rather involve routine decisions typical of leadman positions that are found by the Board not to be statutory supervisors." Ibid [citations omitted].

The Stipulated Election Agreement excludes team leaders and supervisors as defined in the Act from the unit. Although the Respondent argues that supervisory status was the basis for the exclusion, the agreement does not stipulate that team leaders are supervisors. There is no evidence whatsoever regarding the discussions relating to the Stipulated Election Agreement. In imposing upon Gates the requirement that he adopt an anti-union stance, the Respondent "made a calculated decision that . . . [team] leaders were supervisors within the meaning of the Act. An error in that assessment does not excuse unlawful conduct." *Lampi, L.L.C.,* 322 NLRB 502, 505 (1996).

Sellers never asked Gates about his union sympathies. The conversation confirms that Sellers was aware of Gates' sympathies and that Gates voluntarily confirmed them when he explained that his family was third generation union. In requesting Gates' opinion of why the Union was seeking to organize, Sellers did not demand that Gates divulge the names or activities of employees whom he knew supported the Union. Contrary to the complaint allegation of interrogation, there is no evidence that Sellers interrogated Gates regarding his union sympathies or the union sympathies of other employees. Sellers knew Gates' union sympathies and demanded that Gates not simply remain neutral but oppose the Union or lose his job. The threat of termination violated Section 8(a)(1) of the Act. The termination violated Section 8(a)(3) of the Act.

Following Gates' termination, a foreman with MEI, an electrical contractor that performed work at the Austal facility, called Gates and asked if he was interested in working with that company. Gates replied that he was. The foreman stated that he needed to check with Austal. The following day, he called Gates and told him that he could not hire him because he was barred from Austal's property. Production Coordinator Growden confirms that he advised MEI that Austal "would rather not have Gates on the property." Even if I had found that Gates was a supervisor with the Respondent, he would have been an employee, not a supervisor, with MEI. The Respondent's interference in Gates' employment opportunity because of his failure to support the Company's opposition to the Union violated Section 8(a)(3) of the Act.

D. The Suspension and Discharge of Tony Causey

Tony Causey was a fabricator who began his employment with the Company on May 14, 2001. Causey acknowledged that he had been counseled regarding his attendance by his supervisor Dennis Sigur prior to the advent of the Union. A warning dated February 22 reflects that Causey was 1 minute late on February 20 and 22 and 4 minutes late on February 21.

The same incidents of tardiness were repeated in a warning dated March 27 that cited Causey for absences on March 4 and 5. Supervisor Sigur directed Causey to call in before 9 a.m. if he had to be absent for any reason. Causey was an active union adherent and his prounion sympathies were exhibited by his wearing a union t-shirt and sticker.

On April 24, Causey sought and received permission from Supervisor Sigur to be off on April 25, the date of his 10th wedding anniversary. Upon reporting to work on April 26, Sigur issued a suspension to Causey for missing the 25th. The suspension document referred to "past tardies and absentees" and stated "you will be given a three day suspension . . . upon your return." Causey protested that he had received permission to be off on April 25 and Sigur replied that he was "not supposed to be off." Thereafter Causey met with Production Coordinator Growden. Causey recalls that Sigur was present. Growden does not place Sigur at their meeting. Growden explained to Causey that he was not supposed to be off because of his attendance problems. Causey responded that Sigur had approved his absence and asked why Sigur had "okay[ed] it if I couldn't be off." Causey was asked to wait in the breakroom. Vice president Sellers observed Causey waiting in the breakroom and spoke to him. Causey complained to Sellers that it was not right for him to be written up after his supervisor "okays me to be off." Shortly thereafter, Causey was called into a small group meeting that was being conducted by Growden and Sellers. In the course of the meeting, the same meeting noted above, Sellers addressed Causey's suspension, stating that he was responsible for Causey having been written up, that he had "looked at everyone's attendance," that "he was the one at fault for getting me wrote up." Following this meeting, Sellers told Causey to go home that day and that he would take care of it. As Causey was leaving, Sellers approached him and told him that he had learned that Causey had already talked with Growden and that he would have to serve the 3-day suspension.

On May 7, Causey called into the Company prior to 9 a.m., between 8 and 8:30 a.m. and reported to the receptionist that he was experiencing pain from a prior injury and was going to the doctor. He did so and obtained a doctor's slip. Upon reporting to work the following day, Causey brought with him the doctor's slip. Before he saw Supervisor Sigur, Causey spoke with his leadman who suggested that Causey see the company doctor. Following this conversation, Causey was approached by Supervisor Sigur who told him to get his tools, that he was being let go. Causey responded that he had his doctor's slip, that he was out because of his injury, and that he wanted to see the company doctor. He gave the doctor's slip to Supervisor Sigur. Supervisor Sigur told Causey to wait. After an hour and a half, Supervisor Sigur returned with Growden. Causey repeated what he had previously said. Both then left. Supervisor Sigur returned and escorted Causey outside where he encountered "Bender's personnel guy," identified in the record as Bobby Woods, to whom he explained his injury and his desire to see a company doctor and "to check the record." Woods responded that someone would contact him in 2 or 3 days. On the same day, about 1:30 p.m., Woods called Causey and told him he was being let go. Causey repeated that it "wasn't right" that he was being let go and that he had done what he was supposed to as far as calling in and bringing the doctor's slip.

Causey was never told that he was being terminated for absenteeism. He was simply told he was being let go. Absenteeism and tardiness is reflected as the reason for the termination on Causey's Personnel Clearance Report.

Sellers acknowledges reviewing the attendance of employees and speaking with Causey regarding his suspension. He did not deny stating that he was responsible for the suspension. He testified that, when he spoke with Causey, Causey was "quite convincing," that he then spoke with Growden. According to Sellers, Growden told him, "This is what he [Causey] probably said to you." Sellers acknowledged that it was and asked Growden how he knew that, and Growden replied, "The time before when he was disciplined, he used the exact same reasons." The foregoing testimony by Sellers reveals no substantive information regarding the conversation with Causey or the "reasons" purportedly stated by Growden. Causey stated only one reason for the unfairness of the warning: he had permission from Sigur to be off.

Growden testified that he checked with Sigur who, he says, told him that he had not given Causey permission to be off. I do not credit that testimony. Sigur did not testify. Growden never stated the purported denial of permission to Causey, nor did Growden assert making such a report to Sellers. Sellers did not testify that he received such a report. If he had, Sellers would certainly have informed Causey that Supervisor Sigur disputed the claim that permission for the absence had been given. Growden did not address the termination of Causey.

Sigur, who continues to be employed by the Company as established by the testimony of employee Nathaniel Haywood that Sigur is his supervisor, did not testify. I have credited Causey's testimony regarding his receipt of permission to be off on April 25. His testimony regarding calling in on May 7 and his bringing a doctor's slip on May 8 is uncontradicted.

The analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is applicable in dual or mixed motive cases after the General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in that activity. All of the foregoing elements were established with regard to the suspension and termination of Causey. When the reason given for an action is either false, or does not exist, General Counsel's prima facie case is unrebutted, thus there is no need for further analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent's suspension of Causey on April 26, after Sigur had given him permission to be off, was totally unjustified. Causey properly reported his absence on May 7. Sigur told Causey that he was being let go, with no further explanation, before Causey gave him the doctor's slip. It appears that, even though unstated by Sigur, the Respondent had intended to seize upon Causey's absence on May 7 to justify his termination. Causey's presentation of the doctor's slip complicated matters. Sigur told Causey to wait, which Causey did for over an hour. The failure of Sigur, upon his return, to state to Causey the reason for his termination confirms that the absence of May 7 was not the reason, although absenteeism is what the Respondent recorded

on Causey's personnel clearance report. Sigur did not testify. Growden did not address Causey's termination. I find that absenteeism and tardiness, the reasons for the discharge stated on Causey's personnel clearance report, were false and a pretext for terminating Causey because of his union activity. Respondent, by suspending and terminating Tony Causey because of his union activity, violated Section 8(a)(3) of the Act.

E. The Discharge of Joe Wooten

Employee Joe Wooten was hired as welder trainee on May 7, 2001. Thereafter he was assigned as a janitor. There is no evidence that he attended in any union meetings or wore any paraphernalia identifying himself as a supporter of the Union. The only evidence relating to Wooten's union sentiment was his testimony that he spoke with William (Billy) Dunn regarding "the advantages and disadvantages of a union, and we had both agreed that this was what we needed to do," that they would vote "Yes."

On January 29, 2003, the third day of the hearing, immediately prior to calling Wooten as his next to last witness, Counsel for the General Counsel moved to amend the complaint to allege Dunn as a supervisor. I reserved ruling upon the motion at that time. Dunn voted in the election without challenge. He is not classified as a team leader. Wooten's testimony established that his supervisor was Pauline Nobles, who had testified on the previous day, January 28. Counsel for General Counsel did not move to allege Dunn as a supervisor at that time, thus Nobles was not questioned regarding Dunn because there was no issue relating to Dunn at the time she testified. The charge alleging Wooten as a discriminatee was filed on May 9, thus the General Counsel had more than sufficient time to determine what allegations were needed in order to establish a prima facie case. In these circumstances I determined that an amendment at the eleventh hour was not timely, and I denied the motion to amend.

Wooten was discharged on May 8. He was unable to punch in at the timeclock that day because he had taken his timecard home and forgotten it. He testified that he began taking his timecard home because some unidentified person was "playing monkey business with my timecard." There is no evidence that Wooten brought this to the attention of any supervisor. The memorandum accompanying Wooten's personnel clearance report states that Wooten was terminated for excessive absenteeism. The personnel clearance report does not have an entry for absenteeism. The work performance block on that document is checked.

More than a month before the union organizational effort and prior to a final warning that Wooten received on March 18, Wooten began keeping notes documenting various incidents of alleged discrimination and harassment that he encountered. At the top of the document is the notation, "Attn. EEOC." There is no evidence that Wooten filed any charge with the Equal Employment Opportunity Commission.

The record establishes a litany of offenses by Wooten prior to the union organizational effort. On March 18, Wooten met with Growden and Supervisor Mickey Slade regarding his absences, work performance, and attitude. The document memorializing that meeting is signed by all three participants. Wooten testified that he signed only because he was informed that he would be terminated on the spot if he did not do so. The document states that it constitutes a final warning and that any further "problems" would result in termination.

As already noted, there is no evidence that the Respondent was aware of Wooten's union sympathies. He attended no meetings; he wore no union paraphernalia. The only evidence relating to his union sympathies was his conversation with Dunn in which both agreed that they would vote for the Union. Even if I were to find that the General Counsel established a prima facie case with regard to Wooten, I would further find that the Respondent rebutted that case and established that Wooten was discharged for cause. I shall recommend that this allegation be dismissed.

F. The Layoffs/Terminations

1. Facts

When Austal began operations, it did not have a contract for a vessel. It began constructing a "spec boat," a vessel of "a marketable size" for which the Company hoped to find a buyer. When the Company obtained contracts for two crew boats, vessels to ferry employees to oil rigs in the ocean, it ceased work on the spec boat and concentrated on the boats for which it had contracts. Although no dates were given, it appears that, while constructing the two crew boats, Austal obtained a contract for the "spec boat," which became the New York Fast Ferry, and a contract for a boat referred to as the Miami Dinner Boat. Vice president Thornton testified that, in May, the New York Fast Ferry was almost complete and that the Miami Dinner Boat was 40 to 50 percent compete but that the "aluminum structure and the majority of the welding were almost completed" on the Miami Dinner Boat. No spread sheets or other documentation establishing the actual status of construction was offered into evidence.

The Company contends that layoffs became necessary because of a lack of work caused by the loss of a prospective contract to build a crew boat for Oceanic Fleet, Inc. The Company was advised on April 17 that Oceanic had decided to have the boat built by a different company. Austal had been in negotiations regarding the prospective contract for several months. Pursuant to a "handshake agreement" it had begun design for the vessel. Thornton initially testified that Austal "started purchasing aluminum" in reliance upon the "handshake deal," but later testified that the aluminum was ordered but not purchased.

Thornton testified that the next boat for which the Company obtained a contract was a boat referred to as the New York Dinner Boat and that this contract was obtained in late June. No documents establishing exactly when the contract was obtained were placed in evidence. When employee Zolia Powell was terminated she was told that in "three to four months, I should see an ad in the paper, that they would be doing rehiring." The record does not establish whether this representation was speculation or whether management was aware that Austal had already obtained the contract for the New York Dinner Boat and knew that construction was scheduled to begin in August.

Powell had heard rumor of an impending layoff prior to being called to a small group meeting. Near the end of the meeting that she attended, Powell raised the issue of layoffs, stating

that she had "heard rumors that there was going to be a layoff." She recalls that Sellers responded first stating, "[W]e don't do layoff," that, if anything, employees would be terminated.[4] Thornton then stated, "We are not laying off."

Sellers recalls Powell raising the issue of layoffs and testified that he stated that Austal "follows the same principle that Bender Shipbuilding follows," that employees are not laid off, they are terminated. I do not credit that testimony. When informing Powell, "[W]e don't do layoff," he was stating Bender's policy, not Austal's. No Austal executive testified that Austal followed Bender's policy, and neither Growden nor Thornton corroborated Sellers testimony that he stated that Austal did so. There is no evidence that Austal had any policy at the point that both Sellers and Thornton responded to Powell because, at that point, no layoffs were contemplated. Sellers testified that he told Powell that, as far as he knew, no layoff was planned, and Thornton did not deny stating, "We are not laying off." When a reduction in the employee complement became necessary, Thornton referred to it as a layoff.

Thornton testified that a meeting at which it was determined to reduce the employee complement occurred only 1 or 2 days before May 9. Presumably, the selection of the employees occurred at that same meeting. Thornton placed himself, CEO Lerchbacker and Growden in that meeting. Although Lerchbacker testified regarding the loss of the prospective contract, neither he nor Growden addressed the basis for the selection of employees for layoff. Thornton testified that the Company "wanted to lay off . . . the least [number of employees] as possible." The employees were chosen on the basis of salaries, the "lowest-paid welders," since that trade had the least amount of work. All welders making $13 an hour or less were laid off. A memorandum signed by Thornton dated May 9 states: "The following employees were *laid off* due to lack of work on May 9, 2002." (Emphasis added.)

The memorandum lists nine employees as being laid off, eight of whom are alleged as discriminates herein.[5] The eight alleged discriminates are: Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer. No dissatisfaction with their work was cited as a basis for their selection. All were informed individually by Growden and "Bender's personnel guy," Bobby Woods, that their selection was not personal, but that they were terminated. Typical of the remarks made at the separation interviews was the testimony of Gatwood who was told that Company had lost a contract and that he was being terminated. He was then assured that his termination "wasn't any reflection on my work, [that he] showed up for work on time, [and] [t]hey didn't have any problems out of me." Gatwood was told that he "ought to come back on a later date and put an application in." In a similar manner, Powell was told that she was "a great worker." Growden and Woods shook her hand and Woods told her that in "three to four months, I should see an ad in the paper, that they would be doing rehiring, and . . . for me to contact the Company . . . to come back . . . ."

Six of these alleged discriminatees testified. All six supported the Union. Gatwood, Hill, Jenkins, Love, and Powell wore union insignia and Spencer informed Team Leader Reed that he supported the Union. Reed did not deny that conversation. The record does not establish the union sympathies of Gleason. Kidd was identified as not supporting the Union.

Wayne Jenkins was the only employee who followed up upon the Company's suggestion that they put in applications. In December, he saw an advertisement that Austal was hiring in all crafts. On December 23, he went to the Company office and filled out an application. While doing so he saw Production Coordinator Growden enter the office. Growden noticed him, spoke, then entered the office of Office Manager Mary Dwyer. Upon leaving her office, Growden opened the door of Scott Reese, the individual who was interviewing applicants, and stated that he needed to see him. When Reese completed the interview he was conducting, Reese exited from his office. Jenkins did not see where he went. Shortly thereafter, he returned. He obtained Jenkins' application from the receptionist and called Jenkins into the office. He noted that Jenkins had previously worked for Austal and asked why he left. Jenkins replied that he was fired because of the Union. Reece then asked why Austal should hire him back, and Jenkins replied that he didn't miss too much time, that he worked hard, and was a good worker. Reece stated that he would give the application to the appropriate supervisor. Thereafter, Jenkins received an undated letter thanking him for his interest in working for Austal but informing him that he was not selected. The letter does not inform Jenkins that his application was a futility since the internal personnel clearance report, completed at the time of his termination in May has "NO" circled following the question "WOULD YOU REHIRE?"

Growden did not address the failure to the Respondent to offer employment to Jenkins.

The same entry, "WOULD YOU REHIRE?" with the word "NO" circled appears on the personnel clearance report of each of these alleged discriminatees.

Prior to employee union activity, on February 14, employee Patrick Lyons, simply left his employment. His personnel clearance report shows "abandonment of employment" with no further explanation. In response to the question "WOULD YOU REHIRE?" the word "YES" is circled. On August 20, employee Andrew Geoghagan, who was employed on April 9 and was not shown to have engaged in any union activity, left for an "unspecified leave of absence." His personnel clearance report reflects that he would be rehired.

Donnell Hill had worked for the Respondent for less than 2 months. He was hired on March 20. When interviewing for his job, Hill noted that he had been laid off from several jobs and wanted to find a "good, secure job." Calhoun assured him that the Company "had a lot of work." At the time he was terminated, Hill asked if he was eligible for rehire and was told, "Yes." He was not told that his personnel clearance report had the word "NO" circled after the question "WOULD YOU REHIRE?"

[4] The Respondent's brief incorrectly states that Powell attributed this statement to Lerchbacker. Powell attributed the remark to "the CEO of Benders." Lerchbacker did not testify to making any such comment, and Sellers testified that he was not at that meeting.

[5] No party, either at the hearing or in their briefs, refers to Christopher Lyles, who is listed on the memorandum but not alleged as a discriminatee. I shall make no finding regarding him.

In early June, the Company proceeded with plans to institute an apprenticeship program developed under Thornton's guidance following an Australian model. The goal of the program is to develop multi-crafted employees. Pursuant to this 2 year program, the apprentices receive on-the-job training for 8 hours a day at the Austal facilities on Monday, Tuesday, Wednesday, and Friday and classroom instruction at Bishop State Community College on Thursday. The 18 individuals selected for the program earn $8 per hour for a 40-hour workweek. Thornton noted that the apprentices did not, at first, perform productive work, that, initially their on-the-job training consists of "assisting and watching" welders, fitters and shipwrights. Although Thornton testified that multi-craft training was available for the welders who were laid off, he asserted that "nobody wanted any multi-craft training, . . . [t]hey just were pure welders." He acknowledged that the employees were not asked or offered such training at the point that they were laid off.

Between August 22 and 29, the Company hired 5 welders. From September 12 through 18 it advertised for employees, including welders, through a radio announcement and, thereafter, placed advertisements for employees, including welders, in newspapers.

2. Analysis and concluding findings

Under the analytical framework of *Wright Line*, I find that the Respondent was aware of the union sympathies of six of the employees terminated on May 9, that it bore animus towards employees who engaged in union activities, and that the termination of these employees was an adverse action. The General Counsel has established a prima facie case. Notwithstanding the absence of evidence of union activity by Kidd or Gleason, to have excluded them after asserting that the basis for selection for layoff was classification as a welder with a pay rate of $13 per hour or less would have negated the purported nondiscriminatory basis for selection.

The General Counsel argues that payroll records reflect that multi-crafted welders who were retained worked approximately 120 hours of overtime in the week following the layoff and approximately 50 hours of overtime the following week, the week of the election. The payroll records do not, however, show the specific work being performed by these employees. Even assuming that the overtime involved ordinary aluminum welding, the number of hours worked would not provide employment for eight employees.

The record does not show the Respondent's work schedule prior to May 9 and whether that schedule was changed after May 9. The layoff of the eight alleged discriminatees, six of whom were known to support the Union, certainly raises the suspicion that the Respondent's action was other than economically motivated; however, suspicion is no substitute for proof and there is no probative evidence that there was work for these employees in June, July, and early August. There is no probative evidence establishing that the layoffs were accelerated.

There is compelling evidence that the Respondent discharged, rather than laid off, these employees in order to assure that they would not be eligible to vote. The total number of voters in the election, including challenged ballots, was 71, thus the layoff affected more than 10 percent of the bargaining unit. The employees, when being informed that they were being terminated, were told that in "three to four months" they should see advertisements that the Respondent was "doing rehiring." Had the employees been laid off, as Thornton's memorandum states that they were ("The following employees were laid off due to lack of work on May 9, 2002."), the foregoing assurance would have established a reasonable expectation of recall and, consequently, eligibility to vote.

Sellers, Bender's vice president, not Thornton, told Powell that "we don't do layoff." In so stating, he was reporting Bender's practice. Austal had no policy at that time and no Austal executive testified that Austal followed Bender's practice. When faced with the necessity of reducing the employee complement, Thornton's memorandum stated "laid off."

Sellers was not at the meeting in which the Respondent determined to lay off employees. Thornton, in his testimony, did not address the discrepancy between his memorandum stating, "The following employees were laid off due to lack of work on May 9, 2002," and the fact that the employees were actually discharged. The involvement of Bender's executives in Austal's affairs suggests that, following that meeting, Sellers explained the ramifications of a layoff as opposed to termination and the decision to layoff was changed to a decision to discharge. Regardless of how the change came about, Thornton's memorandum establishes that the initial decision was that the employees were to be laid off. That decision was later altered and the employees were discharged. The conversion from layoff to discharge assured ineligibility for the election. *IMAC Energy*, 305 NLRB 728, 737 (1991).

The record establishes that what would have been temporary layoffs were converted to terminations in order to disenfranchise these prounion employees. If the employees had been laid off, as Thornton's memorandum reports, those layoffs would have been temporary. Powell was told to look for advertisements for employees in "three to four months," and the Respondent's brief asserts that the employer "went out of its way to inform the employees that they could apply." The brief does not address the Respondent's documents that establish that such applications would be futile. If these employees had been lawfully laid off, all would have had a reasonable expectation of recall in the near future. The Board condemns such disenfranchisement. In *Earle Industries*, 260 NLRB 1128 (1982), the Board found that the temporary layoff of an employee therein "was converted to a permanent layoff, which conversion is tantamount to termination. That conversion was done solely for the purpose of influencing the outcome of the election by disenfranchising an eligible voter. This type of action has been found violative of Section 8(a)(1) and (3) of the Act." *Free-Flow Packaging Corp*., 219 NLRB 925 (1975); *Elm Hill Meats of Owensboro, Inc.*, 205 NLRB 285 (1973). Id at 1138. See also *Link Mfg. Co*., 281 NLRB 294, 299, 300 (1986), enfd. 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988). I find that the discharge, rather than temporary layoff, of these employees was motivated by the Respondent's animus towards their union activities.

The General Counsel established a prima facie case. The Respondent rebutted that case only to the extent that it established a business justification for temporary layoffs. The Respon-

dent's discriminatory motive in discharging these employees is confirmed by the entry on the personnel clearance report of each alleged discriminatee where the question: "WOULD YOU REHIRE?" is followed by the circled word "NO." Notwithstanding the invitation to each employee to reapply as soon as they learned that the Respondent was hiring, the Respondent had made such applications futile because its document said "NO." The reality of that futility was confirmed when Jenkins sought reemployment. Employees Patrick Lyons and Andrew Geoghagan, who simply left but who had not engaged in union activity, were eligible for rehire. None of the Respondent's witnesses addressed the "NO" entry on the personnel clearance reports of the alleged discriminatees. No explanation was offered regarding the inconsistency between the assurance to each employee that there was no problem with that employee's work coupled with an invitation to reapply and the entry on the Respondent's document that it would not rehire. The Respondent sought to rid itself of these union adherents permanently. By discharging Warren Gatwood, Donnell Hill, Wayne Jenkins, Andre Love, Zolia Powell, and Dirk Spencer because of their union activities and by discharging Curtis Gleason and Micah Kidd so as not to negate the purported nondiscriminatory basis for selection of the foregoing union adherents, the Respondent violated Section 8(a)(3) of the Act.

G. The Postelection 8(a)(3) Allegations

1. Hank Williams

On June 18, employee Hank Williams, a union advocate with whom Growden spoke privately regarding employees' concerns, was warned for having made a weld repair that failed an x-ray test. Supervisor Calhoun showed Williams the weld, his repair upon a weld performed by another employee that had failed the initial x-ray test. Calhoun, when presenting the waning, struck out the work "written" and inserted the work "verbal." Williams refused to sign it.

Williams testified that he was unaware of any employee being warned for a problem with "one weld." Warnings issued by Calhoun to other welders refer to overall "lack of quality" not a single designated repair. Although Calhoun testified that Williams performed the initial weld, the repair that failed, and the third weld that passed, the warning refers only to a "weld repair," not two defective welds, the initial weld and the defective repair. Williams testified that Team Leader Reed informed him that Calhoun and employee Joe Brack made a third attempt on the weld and it again failed.

The Respondent was well aware of Williams' union sympathies and its animus is amply demonstrated on the record. The General Counsel established a prima facie case that the warning was motivated by Williams' support of the Union. Although Calhoun testified that the repair was his second attempt, the warning refers only to a single weld repair, not two defective welds. There is no evidence of any previous instance of discipline for making one defective weld. The Respondent had not rebutted the General Counsel's prima facie case. By warning Williams because of his union activities, the Respondent violated Section 8(a)(3) of the Act.

2. Darrell Spencer

Also on June 18, the Respondent suspended Darrell Spencer for failure to made a proper weld, "RT weld FR 9-10 intersection." Spencer, like Williams, was prounion. As discussed above, he had spoken in favor of the Union with Team Leader Reed, who had threatened plant closure should the Union succeed in organizing the employees. Spencer acknowledged that the weld he performed was defective, explaining that he had informed Calhoun that he wanted to use "a smaller diameter wire due to the thickness of the base material," and that Calhoun told him he could not and insisted that the use a larger diameter wire. The result was that "it busted out twice."

The suspension document states that Spencer was suspended for "lack of quality work (RT weld FR 9-10 intersection . . .)." Calhoun initially testified that Spencer claimed that he needed a smaller diameter wire as an excuse when he suspended him. Thereafter, Calhoun acknowledged that Spencer had requested to use a smaller wire when attempting to perform the weld but that he had denied him permission to do so, referring to "specifications" that prescribed the thicker wire. Despite the wording on the suspension, Calhoun testified that the warning was not for making the defective weld but making a weld that Spencer knew was bad. Spencer credibly testified that he "did not weld it deliberately for it not to pass. I did the best that I could do" using the thicker wire that Calhoun demanded that he use. In the past, Spencer had been permitted to "use whatever size wire I wanted to."

The Respondent, having put Spencer in a situation where he could not properly perform the weld, warned him for poor quality. At the hearing, however, the Respondent asserted that the suspension was not for poor quality but for knowingly making a bad weld. Such shifting rationale is a hallmark of unjustified disciplinary actions. The Respondent did not rebut the General Counsel's prima facie case. The Respondent, by suspending Spencer because of his union activities, violated Section 8(a)(3) of the Act.

H. The Objections to the Election

The Petitioner filed Objections to the Election, many of which are coextensive with the allegations of the complaint. The Petitioner urges that I also find certain conduct that is not coextensive with any complaint allegation to be objectionable.

1. Objection 4: Mandatory overtime

Although this objection alleges that the Employer made overtime mandatory and that this interfered with employees' attendance at a scheduled union meeting, there is no probative evident that overtime was ever mandatory. Employee Robert Skeleton testified that he heard Calhoun state that employees would be working mandatory overtime on the day after the layoffs, but Skelton was on light duty and this purported requirement did not affect him. Hank Williams testified that, immediately after the layoff, Calhoun and Reed both stated that the employees would have to start working some overtime. He did not testify that the overtime was mandatory. I shall recommend that this objection be overruled.

2. Objections 6, 7, 8: Parties and tickets

In the week prior to the election, employees were inundated with demonstrations of the Employer's largess. On May 17, the Friday before the election, employees were treated to a catered barbeque at the facility where food and beer were served and pictures of one of the crew boats that had recently been completed were distributed. In the same time period, employees were advised that CEO Lerchbacker had 50 free tickets to a concert by a group, Poison. Although the record does not reflect the date of the concert, Lerchbacker confirmed that it occurred before the election. On May 23, the day before the election, the Employer hosted a dinner off premises at local restaurant at which free food and drinks were served.

The Employer presented evidence of various other functions on the premises prior to the union's organizational campaign. Vice president Thornton acknowledged that, prior to May 17, such functions had been handled "in house," but explained that the Employer began utilizing caterers when the financial controller determined that the serving of beer by the Employer raised a liability issue. Thornton acknowledged that the party off the premises was unprecedented. CEO Lerchbacker was offered the 50 free tickets to the Poison concert by a friend who had a business relationship with the local convention center at which the concert was performed. He accepted them and chose to distribute them to employees who asked for them rather than giving them to customers or vendors with whom the company did business.

The barbeque on the premises would have included the entire employee complement of approximately 80. It cost $2,120, about $26 per person. The bill at the local restaurant totaled $1273. The number of employees, as opposed to employees and guests, is not established, but assuming a total of 50 people, as estimated by former supervisor Pauline Nobles, the cost per person would have been about $25. The record does not establish the value of the Poison tickets. Assuming the value to have been about $25, an employee who attended all three functions would have received an economic benefit of about $75.

The Employer argues that the "Union apparently thinks Austal employees are easily bought." Contrary to that argument, the issue is not bribery. Assuming that staunch prounion and antiunion employees will not be swayed by any amount of "politicking," the inquiry is interference with the free choice of voters who do not have their minds made up. With regard to them, "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 US 405, 409 (1964). In assessing the grant of preelection benefits, the Board, applies objective criteria including the size of the benefit, the number of employees receiving it, how employees reasonably would view the purpose of the benefit, and the timing of the benefit. *B & D Plastics*, 302 NLRB 245 (1991). Although neither of the two parties nor the tickets, standing alone, is of inordinate value, when combined the value is not insubstantial. All unit employees were potential recipients of these benefits. The Employer presented no justification for the timing of these benefits. Although there was precedent for the barbeque on the premises, the tickets and off premises party at a local restaurant were unprecedented. No evidence was adduced to establish that the barbeque on the premises or the party at the restaurant on the eve of the election had been planned prior to the union's organizational effort. In these circumstances, I can reach no conclusion other than that the employees who were recipients of these multiple benefits within days of the election would not view them in isolation but would "reasonably view [them] . . . as intended to influence their votes in the election." Id at fn. 2. I shall recommend that Objections 6, 7, and 8 be sustained.

3. Objection 9. The presence of guards

On the day of the election, when employees arrived at the gate to the facility, they observed Production Coordinator David Growden and two uniformed security guards. Growden testified that he was present to identify employees and the guards were present to "in case we had any problem where people wanted to come on the yard that shouldn't be there." Notwithstanding this purported separation of functions, testimony established that the guards, not Growden, were asking for employee identification before permitting entry to the premises. Employee Robert Skelton was one of those employees. He described the guards as wearing military style uniforms. This was confirmed by employee Nathaniel Haywood who was also asked to identify himself. Haywood noted that the guards were carrying sidearms. Employees Joseph Kyles and David Moulden had their names marked off a list by one of the guards, not Moulden. Guards had never before controlled access to the premises. On one occasion in the past, they had been present at the end of a workday to confirm that employees were not leaving the premises with unauthorized materials. Guards had never previously been present at the beginning of a workday to control employees' entry onto the property. Although vice president Thornton asserted that the guards were posted to "make sure . . . we only had relevant people on site because there had been large number of people gathering at the gates," there is no probative evidence of such gatherings. Growden admitted that there had been no prior problem with unauthorized persons coming onto the property. The unprecedented posting of guards and requirement that employees identify themselves before entering the premises had no purpose other than intimidation. Similar unprecedented use of security personnel has been found to violate Section 8(a)(1) of the Act. *Beverly California Corp.*, 326 NLRB 232, 261 (1998). Growden's admission establishes that there was no "demonstrated need for this action." Ibid. I find that the unprecedented presence of uniformed guards at the plant entrance on the day of the election created an atmosphere that interfered with the employees' right to exercise their choice free from intimidation by the Employer. I recommend that this objection be sustained.

I have found that, after the petition was filed and prior to the election, the Respondent engaged in violations of Section 8(a)(1) and (3) of the Act. This conduct parallels various objections to the election filed by the Union. Objection 1 alleges the threat of unspecified reprisal to employee Skelton (Subparagraph 7(a) of the complaint). Objection 2 alleges the unprecedented assessment of employees that I have found constituted harassment (Paragraph 11 of the complaint). Objection 3 alleges the direction that employee remove union stickers from their hardhats (Subparagraphs 7(b) and 9(j) of the complaint).

Objection 5 alleges the discharges of the employees alleged in various paragraphs of the complaint, all of which, except for the termination of Wooten, I have found to have violated the Act.

I find that the foregoing violations of the Act that occurred during the critical preelection period and correspond to the Union's objections, the grant of benefits in the form or parties and tickets as set out in Objections 6, 7, and 8, and the posting of guards on the day of the election as set out in Objection 9 interfered with the employees' free choice of representation and that the election must be set aside and a new election held.

CONCLUSIONS OF LAW

1. By coercively interrogating employees regarding their union sympathies and activities, threatening employees who supported the Union with unspecified reprisals, threatening to terminate employees for engaging in union activities, prohibiting employees from displaying union logos or insignia on hardhats, discriminatorily restricting employees from discussing unions, threatening employees with plant closure if they selected a union as their collective bargaining representative, harassing employees because of their support of the Union, soliciting employee grievances and promising to remedy them in an effort to dissuade employees from supporting the Union, threatening to discharge an employee for failure to oppose the Union, and threatening discipline pursuant to more stringent enforcement of rules because of employee union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By warning, suspending, and discharging employees, because of their union activities and interfering in the employment opportunity of a former employee because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily warned Hank Williams, it must rescind that warning.

The Respondent having discriminatory suspended Tony Causey and Darrell Spencer, it must rescind the suspensions and made Causey and Spencer whole for any loss of earnings and other benefits they suffered as a result of the suspensions.

The Respondent having discriminatorily discharged and interfered with the opportunity for employment of Charles Gates and having discriminatorily discharged Tony Causey and Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer, it must offer them reinstatement and must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge, in the case of Gates and Causey, and from August 22, 2002, the date the Respondent began hiring welders, in the cases of Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Austal USA, L.L.C., Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union sympathies and activities.

(b) Threatening employees who support the Union with unspecified reprisals.

(c) Threatening to terminate employees for supporting the Union.

(d) Prohibiting employees from displaying union logos or insignia on their hardhats.

(e) Discriminatorily restricting employees from discussing unions.

(f) Threatening employees with plant closure if they select a union as their collective bargaining representative.

(g) Harassing employees because of their support of the Union.

(h) Soliciting employee grievances and promising to remedy them in an effort to dissuade employees from supporting the Union.

(i) Threatening to discharge an employee for failure to oppose the Union.

(j) Threatening to discipline employees pursuant to more stringent enforcement of its rules because of employee union activity.

(k) Interfering with the employment opportunities of former employees because of their union sympathies.

(l) Warning, suspending, discharging, or otherwise discriminating against any employee for supporting Sheet Metal Workers International Association Union, Local 441 or any other union.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, Dirk Spencer, and Darrell Spencer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning issued to Hank Williams, the unlawful suspensions issued to Tony Causey and Darrell Spencer, and the unlawful discharges of Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer, and within 3 days thereafter notify the employees in writing that this has been done and that the foregoing actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mobile, Alabama, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 15–RC–8394 is severed from Cases 15–CA–16552, et al. and remanded to the Acting Regional Director to conduct a second election when he deems the circumstances permit a free choice.

Dated, Washington, D.C. April 7, 2003

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you regarding your union sympathies and activities.

WE WILL NOT threaten you with unspecified reprisals because of your union support.

WE WILL NOT threaten you with termination because you support the Union.

WE WILL NOT prohibit you from displaying insignia showing your support of the Union.

WE WILL NOT discriminatorily restrict you from discussing unions.

WE WILL NOT threaten you with plant closure if you select a union as your collective bargaining representative.

WE WILL NOT harass you because of your support of the Union.

WE WILL NOT solicit your grievances and promise to remedy them in an effort to dissuade you from supporting the Union.

WE WILL NOT threaten you with discipline pursuant to more stringent enforcement of our rules because of your union activity.

WE WILL NOT interfere with other employment opportunities of former employees because of their union sympathies.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association Union, Local 441 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, rescind the warning issued to Hank Williams and the suspensions issued to Tony Causey and Darrell Spencer.

WE WILL, within 14 days of the Board's Order, offer Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, and Dirk Spencer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Gates, Tony Causey, Warren Gatwood, Curtis Gleason, Donnell Hill, Wayne Jenkins, Micah Kidd, Andre Love, Zolia Powell, Dirk Spencer, and Darrell Spencer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning, suspension, and discharges, and within 3 days thereafter notify the affected employees in writing that this has been done and that those actions will not be used against them in any way.

AUSTAL USA, L.L.C.